Public Prosecutor v Chong Chee Kin & Anor

HIGH COURT (IPOH) — CRIMINAL TRIAL NO 58-5-93
KANG HWEE GEE JC
25 FEBRUARY 1995

Criminal Law *— Dangerous Drugs Act 1952 — Section 39B(1)(a) — Trafficking in dangerous drugs — Cannabis — Whether cannabis involved proved to be of genus cannabis under s 2 — Whether could be cannabis (Indian hemp) — Whether charge of trafficking made out — Whether charge should be amended to possession under s 12(2) — Dangerous Drugs Act 1952 ss 2, 12(2) & 39B(1)(a)*

Evidence *— Agent provocateur — Previous participation in crime — Police informer — Whether informer was in effect an agent provocateur*

Evidence *— Adverse inference — Failure of prosecution to call informer as witness — Whether informer was in effect an agent provocateur — Whether informer entitled to protection under s 40(1) of Dangerous Drugs Act 1952 — Whether adverse inference should be drawn — Dangerous Drugs Act 1952 s 40(1) — Evidence Act 1950 s 114(g)*

Words and Phrases *— 'Informer' — Dangerous Drugs Act 1952 s 40(1)*

Both accused were charged with the offence of jointly and in furtherance of a common intention trafficking in 644g of cannabis under s 39B of the Dangerous Drugs Act 1952 ('the Act'). They were arrested in an operation staged by the police which involved the use of an informer and three agent provocateurs to buy the drug from the accused. The informer introduced Det Sgt Maj Saidin ('Saidin') to the first accused on 22 October 1992 after two earlier attempts had failed. At that meeting the first accused showed Saidin samples of the drug and a discussion on the terms of the proposed purchase took place. The following day the informer and Saidin again met the first accused whereat the first accused made a counter-proposal on the price of the drug. Subsequent meetings took place between Saidin and the first accused without the presence of the informer whereat the arrangements for the purchase of the drug were finalized. On the day of the proposed delivery of the drug, Saidin introduced the other two agent provocateurs ('Zorki' and 'Shakri') to the first accused. That night at the place arranged for the delivery, the first accused took a bag from the second accused and from it the first accused brought out a plastic bag and showed its contents to Zorki. Zorki then arrested the first accused while Shakri together with some other policemen arrested the second accused. The plastic bag was found to contain plant materials which were later analysed by the government chemist to be cannabis. At the trial, counsel for the accused submitted that the charge was vague as the chemist had failed to state whether the cannabis was cannabis as defined under s 2 of the Act and which part of the First Schedule the drug came under. It was argued that the drug could be 'Cannabis (Indian Hemp)' under Pt III of the First Schedule. Counsel also argued that

the informer could not claim protection under s 40(1) of the Act as he was in fact an agent provocateur and the prosecution's failure to call him as a witness should attract an adverse inference under s 114(g) of the Evidence Act 1950 ('the 1950 Act'). A

Held, amending the charge and convicting the accused on the amended charge of possession: B

(1) To prove that the drug cannabis is a dangerous drug, the prosecution needs to prove that the drug is listed in any part of the First Schedule and that it is of the genus cannabis from which the resin has not been extracted. It is clear that cannabis is listed in all the three parts of the First Schedule to the Act. As the chemist had testified that the drug he analysed was from the genus cannabis in which he found an abundance of resin, there could not be any ambiguity that the cannabis he analysed was a dangerous drug as defined under s 2 of the Act. It was immaterial that the chemist did not determine whether the drug could be 'Cannabis (Indian Hemp)' because in determining that the drug was from the genus cannabis, it was sufficient for the purpose of proving that the drug was a dangerous drug under the Act. There was no need to determine the species of the cannabis because under s 2, the cannabis could be known 'by whatever name it may be designated'. C D E

(2) The term 'informer' is not defined anywhere in the Act. In ordinary parlance, the word is used to describe a person who gives information. A police informer is therefore a person who provides information to the police with regard to the commission of a crime. F

(3) While a police informer is not an agent provocateur merely becuase he has accompanied a police agent and introduced him to a drug trafficker, if the informer is present on more than one occasion including the occasion of an accused's arrest, he is a *particeps criminis* and not an informer. G

(4) In the present case, the informer had to be present twice with Saidin before the first accused agreed to supply the drug. It could not be objectively discounted that the sale of the drug would not have been brought about without the informer having been involved in the negotiation. Besides, the informer had to make three appointments before Saidin met the first accused. The informer was thus a *particeps criminis* and an agent provocateur who could not be accorded the protection given to an informer under s 40(1) of the Act or under the normal privilege accorded to such a person under the law. As such, an adverse inference under s 114(g) of the 1950 Act ought to be drawn against the prosecution for its failure to call the informer as a witness. H I

(5) The prosecution's failure to call the informer as a witness rendered the whole of its evidence highly suspicious and at the close of the

prosecution case, it fell short of proof beyond reasonable doubt. The presumption of trafficking arising from the possession and knowledge of the drug by the accused was rebutted by the superior probability, which could be legitimately drawn from the adverse inference, that the accused could have been victims of a frame up.

(6) The evidence of the possession of the drug by the accused could be accepted because it was independent of the participation of the informer. The accused's custody or control of the bag containing the drug was personal to the accused and was not affected by any design of the informer. The prosecution therefore succeeded in proving a case of possession under s 39A(2) of the Act.

[Bahasa Malaysia summary

Kedua-dua orang tertuduh telah dituduh dengan kesalahan bersama-sama dan mengikut niat bersama mengedar 644g ganja di bawah s 39B Akta Dadah Berbahaya 1952 ('Akta itu'). Mereka telah ditangkap di dalam satu operasi yang dijalankan oleh pihak polis yang meliputi penggunaan seorang pemberi maklumat dan tiga orang ejen provokasi untuk membeli dadah itu daripada tertuduh. Pemberi maklumat itu telah memperkenalkan Det Sjn Mej Saidin ('Saidin') kepada tertuduh pertama pada 22 Oktober 1992 selepas dua percubaan terdahulu telah gagal. Di pertemuan tersebut tertuduh pertama telah menunjukkan kepada Saidin sampel dadah itu dan perbincangan tentang terma pembelian yang dicadangkan itu telah diadakan. Pada hari keesokannya, pemberi maklumat itu dan Saidin sekali lagi menemui tertuduh pertama dan di pertemuan itu tertuduh pertama telah membuat satu cadangan balas tentang harga dadah itu. Pertemuan-pertemuan selepas itu berlaku di antara Saidin dan tertuduh pertama tanpa kehadiran pemberi maklumat itu dan di pertemuan-pertemuan itu persediaan untuk pembelian dadah itu telah diselesaikan. Pada hari yang dicadangkan untuk penyampaian dadah itu, Saidin telah memperkenalkan dua orang ejen provokasi yang lain ('Zorki' dan 'Shakri') kepada tertuduh pertama. Pada malam itu di tempat yang dipersetujui untuk penyampaian dadah itu, tertuduh pertama telah mengambil satu beg daripada tertuduh kedua dan dari beg itu tertuduh pertama telah mengeluarkan satu beg plastik dan menunjukkan kandungannya kepada Zorki. Zorki kemudiannya menangkap tertuduh pertama sementara Shakri bersama dengan beberapa orang anggota polis yang lain telah menangkap tertuduh kedua. Beg plastik itu didapati mengandungi bahan tumbuhan yang kemudiannya dianalisakan oleh ahli kimia kerajaan sebagai ganja. Di perbicaraan, peguambela untuk tertuduh berhujah bahawa tuduhan itu adalah kabur kerana ahli kimia itu telah gagal menyatakan sama ada ganja itu adalah ganja seperti yang ditakrifkan di bawah s 2 Akta itu dan di dalam bahagian mana Jadual Pertama dadah itu boleh diletakkan. Telah dihujah bahawa dadah itu boleh

jadi adalah 'ganja (hemp dari India)' di bawah Bah III Jadual Pertama. Peguambela juga mengatakan bahawa pemberi maklumat itu tidak boleh menuntut perlindungan di bawah s 40(1) Akta itu kerana beliau pada hakikatnya adalah seorang ejen provokasi dan kegagalan pihak pendakwa memanggilnya sebagai seorang saksi sepatutnya menarik inferens bertentangan di bawah s 114(g) Akta Keterangan 1950 ('Akta 1950 itu').

Diputuskan, meminda tuduhan itu dan menyabitkan tertuduh atas tuduhan yang dipinda kepada pemilikan:

(1) Untuk membuktikan bahawa dadah ganja adalah satu dadah berbahaya, pihak pendakwa perlu membuktikan bahawa dadah itu disenaraikan di mana-mana bahagian Jadual Pertama dan bahawa ianya adalah dari golongan ganja yang daripadanya resin belum lagi dikeluarkan. Adalah jelas bahawa ganja disenaraikan di dalam ketiga-tiga bahagian Jadual Pertama kepada Akta itu. Oleh kerana ahli kimia itu telah memberi keterangan bahawa dadah yang dianalisanya adalah dari golongan ganja yang di dalamnya beliau mendapati resin yang banyak, tidak terdapat apa-apa ketaksaan bahawa ganja yang dianalisanya itu adalah satu dadah berbahaya seperti yang ditakrifkan di bawah s 2 Akta itu. Adalah tidak penting bahawa ahli kimia itu tidak memastikan sama ada dadah itu boleh jadi adalah 'ganja (hemp dari India)' kerana dalam membuat keputusan bahawa dadah itu adalah dari golongan ganja, ianya mencukupi untuk tujuan membuktikan bahawa dadah itu adalah satu dadah berbahaya di bawah Akta itu. Tidak ada keperluan untuk menentukan spesies ganja itu kerana di bawah s 2, ganja itu boleh dikenali dengan 'walau apa pun nama tumbuhan dijeniskan'.

(2) Terma 'pemberi maklumat' tidak ditakrifkan di mana-mana di dalam Akta itu. Dalam bahasa biasa, perkataan itu digunakan untuk memerihalkan seorang yang memberi maklumat. Seorang pemberi maklumat polis oleh itu adalah seorang yang memberi maklumat kepada pihak polis berkenaan dengan perlakuan sesuatu jenayah.

(3) Sementara seorang pemberi maklumat polis bukanlah seorang ejen provokasi semata-mata kerana beliau telah mengiringi seorang ejen polis dan memperkenalkannya kepada seorang pengedar dadah, jika pemberi maklumat itu hadir pada lebih daripada satu masa termasuk masa apabila tertuduh diberkas, beliau adalah seorang 'particeps criminis' dan bukanlah seorang pemberi maklumat.

(4) Di dalam kes ini, pemberi maklumat itu terpaksa hadir dua kali dengan Saidin sebelum tertuduh pertama bersetuju membekalkan dadah itu. Tidak boleh diketepikan secara objektif bahawa jualan dadah itu mungkin tidak berlaku tanpa penglibatan pemberi maklumat itu di dalam rundingan. Tambahan pula pemberi maklumat itu terpaksa membuat tiga temu janji sebelum Saidin

bertemu dengan tertuduh pertama. Pemberi maklumat itu oleh itu adalah seorang particeps criminis dan seorang ejen provokasi yang tidak boleh diberikan perlindungan yang diberikan kepada seorang pemberi maklumat di bawah s 40(1) Akta itu atau di bawah keistimewaan biasa yang diberikan kepada orang sedemikian di bawah undang-undang. Oleh itu satu inferens bertentangan di bawah s 114(g) Akta 1950 itu patut diambil terhadap pihak pendakwa akibat kegagalannya memanggil pemberi maklumat itu sebagai seorang saksi.

(5) Kegagalan pihak pendakwa untuk memanggil pemberi maklumat itu sebagai seorang saksi berkesudahan dengan keseluruhan keterangannya menimbulkan kesangsian dan di penutup kes pihak pendakwa, kes itu tidak mencapai bukti yang melampaui keraguan yang munasabah. Anggapan pengedaran yang timbul daripada pemilikan dan pengetahuan tentang dadah itu oleh tertuduh telah dipatahkan oleh kebarangkalian yang lebih tinggi, yang boleh diambil dengan sah dari inferens bertentangan itu, bahawa tertuduh itu mungkin telah menjadi mangsa satu penganiayaan.

(6) Keterangan tentang pemilikan dadah itu oleh tertuduh itu boleh diterima kerana ianya bebas daripada penyertaan pemberi maklumat itu. Jagaan atau penguasaan tertuduh ke atas beg yang mengandungi dadah itu adalah tersendiri kepada tertuduh dan tidak boleh dijejaskan oleh apa-apa niat pemberi maklumat itu. Pihak pendakwa lantaran itu berjaya membuktikan satu kes pemilikan di bawah s 39A(2) Akta itu.]

[*Editorial Note*: The Public Prosecutor has appealed to the Court of Appeal vide Criminal Appeal No A-05–91–94.]

Notes

For cases on agents provocateur, see 7 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 131–146.

For cases on adverse inference, see 7 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 77–119.

Cases referred to

Chee Chiew Heong v PP [1981] 2 MLJ 287(refd)
Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265 (refd)
Munusamy v PP [1987] 1 MLJ 492 (refd)
Namasiyiam & Ors v PP [1987] 2 MLJ 336 (folld)
Soo Seng Huat v PP [1968] 1 MLJ 80 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 158
Dangerous Drugs Act 1952 ss 2, 37(d), (da), 39A(2), 39B, 40, First Schedule
Evidence Act 1950 s 114(g)

Hashim bin Hamzah and *Ridzuan bin Ibrahim* (Deputy Public Prosecutors) for the Public Prosecutor.

Bachan Singh (*Bachan, Kartar & Co*) for the first accused.

Kerpal Singh (*U Harcharan & Kerpal*) for the second accused.

Cur Adv Vult

Kang Hwee Gee JC: Both the accused were charged with the offence of jointly, and in furtherance of a common intention of, trafficking in 644g of cannabis under s 39B of the Dangerous Drugs Act 1952. The offence is punishable by death.

They were arrested in an operation staged by the police from the Cawangan Anti Dadah ('CAD') Perak which involved the use of an informer and three agent provocateurs to buy the drug from the accused. The drug was delivered by the accused in the agents' car outside the Al Amigo Nightclub on 29 October 1992 at about 10.15pm. The case for the prosecution is best understood by the following summary of events.

21 October 1992 at 2.30am: Det Sgt Maj (DSM) Saidin (PW5) received information that a drug trafficker was operating at the McDonald's, Yik Foong and the Kentucky Fried Chicken (Ipoh Gardens) areas; informer promised to introduce trafficker to DSM Saidin at 2pm at the Yau Tet Shin market. On his superior's instruction, DSM Saidin assumed the role of an agent provocateur to meet the trafficker; trafficker did not turn up at the appointed time and place; informer refixed appointment to meet trafficker at McDonald's restaurant, Jalan Cockman; again trafficker did not turn up; informer refixed appointment at same place at 7pm the next day 22 October 1992.

22 October 1992 at 7pm: Informer succeeded in introducing DSM Saidin to alleged trafficker, the first accused, as Michael, at the McDonald's restaurant. The first accused showed samples of ganja to DSM Saidin which he wanted to sell at RM30 per packet; DSM Saidin he wanted 1,000 packets, counter-proposed RM17 to RM20 per packet; promised to meet again on the next day 23 October 1992 at 3pm at Kentucky Fried Chicken, Ipoh Garden.

23 October 1992 at 3pm: Informer and DSM Saidin met first accused at Kentucky Fried Chicken, Ipoh Gardens as promised. The first accused told DSM Saidin the price per packet could be reduced to RM21 per packet but DSM Saidin replied that his boss could not come to fix the price. Parties fixed meeting at 8pm that night.

DSM Saidin met first accused without the informer as planned at the same place where they agreed on price at RM21 per packet for 1,000 packets. They agreed to meet at McDonald's at between 2–3pm on 26 October 1992 to fix time and place of delivery. DSM Saidin informed first accused he will get the money from his friends in Kuala Lumpur.

26 October 1992 at 2pm: DSM Saidin met first accused at McDonald's restaurant as agreed and informed him that friends from

A Kuala Lumpur will arrive on 29 October 1992. Fixed date of delivery on 29 October 1992 at 3pm at Kentucky Fried Chicken, Ipoh Gardens.

29 October 1992 at 2pm: Briefing conducted by Insp Zorki (PW6) at CAD to arrest the accused when he delivered the drug as arranged. DPC Shakri (PW7) and Insp Zorki himself were to be provocateurs in the B planned operation to be introduced to the first accused.

3pm: The three agent provocateurs met the first accused at the KFC where PW6 and PW7 were introduced to him. The first accused informed them that the delivery could not be made because it was unsafe and suggested that delivery be made at Jalan Yang Kalsom in front of Wisma C Kinta at 9.15pm that same day.

8.00pm: Another briefing conducted by Insp Zorki with the same group to plan the arrest. DSM Saidin was to give the arrest signal by opening boot of his car and flashing his torchlight around for the arresting party to act.

D 9.15pm: Police party proceeded to the appointed place of delivery at Jalan Yang Kalsom. The three agent provocatuers, DSM Saidin, Insp Zorki and DPC Shakri went in a car driven by DSM Saidin. DPC Shakri was seated in the front seat and Insp Zorki at the rear. The first accused riding motor cycle ABQ 6000 called out to DSM Saidin when he entered Jalan Yang Kalsom; DSM Saidin made a U-turn and stopped E at where the first accused was; the first accused entered his car by the left rear door and seated himself beside Insp Zorki. At his request, Insp Zorki showed him the flash notes for the purchase; accused told him to wait for the drug to arrive; he left the car and went to his motor cycle and rode off towards the Al Amigo Nightclub which was within sight some distance ahead on the same road.

F A short while later, the first accused came back on foot from the direction of the nightclub to the same place where their car was. He got into the car and informed Insp Zorki that he only had 900 packets of the drug; he handed a calculator to Insp Zorki and asked him to calculate the cost of the 900 packets, which the latter did arriving at the figure of G RM18,900. The first accused then asked Insp Zorki to prepare the said sum for handing over; he then left by foot towards the nightclub.

10.15pm: First accused came to meet Insp Zorki again at the same place where the agent's car was parked. He informed him that the drug had not arrived yet. At that moment another motorcyclist, later identified H to be the second accused, arrived on motor cycle ACC 9487. He spoke to the first accused who responded in a raised voice. The second accused then rode off. The first accused told the agents in the car to go and have refreshments at the Lucky Tuck Boh Restaurant across the road while waiting for the drug to arrive. While they were having their drinks at the restaurant, the first accused came over on motor cycle ABQ 6000 with the I second accused riding pillion. They stopped outside the restaurant. The second accused had a bag (exh P19) which appeared to be loaded strapped on his back. DSM Saidin went over to speak to them. As instructed, the agents proceeded to the Al Amigo Nightclub to take delivery of the drug.

The first and second accused were seen at the side lane bordering the nightclub on the same motor cycle when they stopped their car. The first accused then alighted from the motor cycle, took the bag from the back of the second accused and went into the back of the car where Insp Zorki was seated. From the bag (exh P19) the first accused brought out a plastic bag (exh P44) and showed its contents to Insp Zorki who then asked DSM Saidin to shine his torchlight on it. DSM Saidin then went out of the car to give the prearranged arrest signal by opening the boot of the car and flashing his torchlight. Inspector Zorki himself arrested the first accused in the car and DPC Shakri who had by then got out of the car arrested the second accused with the help of the other police personnel who were detailed to assist in the arrest.

The plastic bag (exh P19) was found to contain 86 plastic packets. Each packet contained 10 smaller plastic packets making a total of 860 in all. Each of these 860 smaller packets contained plant materials which were subsequently analysed by the government chemist, Tiang Tock Ching (PW2), to be cannabis with a total weight of 644g.

At the close of the case for the prosecution, I ruled that there was no case to answer on the charge of trafficking as framed against both the accused, but that there was a case of possession under s 39A (2) of the Act. Accordingly, as empowered under s 158 of the Criminal Procedure Code (FMS Cap 6), I amended the charge to read as follows:

> Bahawa kamu pada 29 Oktober 1992 jam lebih kurang 11 malam di hadapan Kelab Malam Al Amigo, Jalan Yang Kalsom, Ipoh di dalam Daerah Kinta, di dalam Negeri Perak Darul Ridzuan dengan niat yang sama kamu berdua telah memiliki dadah berbahaya iaitu ganja (cannabis) seberat 644g dan oleh itu kamu telah melakukan satu kesalahan di bawah s 6 Akta Dadah Berbahaya 1952 (Akta 234) dan boleh dihukum di bawah s 39A(2) Akta yang sama dibaca bersama dengan s 34 Kanun Keseksaan.

Both the accused elected to remain silent upon being ordered to enter their defence on the amended charge. In accordance with the now established principle in *Khoo Hi Chiang v PP and another appeal* [1994] 1 MLJ 265 (at p 289C), I therefore proceeded to find them guilty and convicted on the amended charge.

Before I state my grounds, it may be appropriate that I consider two salient points (amongst others which I consider not relevant) raised by counsel for the first accused in his submission, the second of which I am in total agreement with.

Point one

The chemist had failed to state whether the cannabis he analysed was cannabis as defined under s 2 and under which part of the First Schedule the drug came under. The chemist's failure rendered the charge against the accused ambiguous and vague and therefore unsustainable, as the drug analysed could be 'Cannabis (Indian Hemp)' under Pt III of the First Schedule.

A Under s 2 of the Act (pre-Act A834) 'cannabis' means 'any part of any plant of the genus cannabis from which the resin has not been extracted, by whatever name it may be designated', and 'dangerous drug' means 'any drug or substance which is for the time being comprised in the First Schedule'.

B To prove that the drug cannabis is a dangerous drug, the prosecution needs therefore to prove that the drug is listed in any part of the First Schedule and that it is of the genus cannabis from which the resin has not been extracted, whether they were 'cannabis' listed in Pts I and II or 'Cannabis (Indian Hemp)' listed in Pt III of the schedule. Now, it is clear that cannabis is listed in the First Schedule in all the three parts and the C chemist had in his evidence stated that the drug he analysed was from the 'genus' cannabis in which he found abundance of resin in its naturally occurring state. There could not therefore in my view be any ambiguity that the cannabis he analysed was a dangerous drug as defined under s 2 of the Act. Although he admitted upon being cross-examined that he did D not determine whether the drug could be 'Cannabis (Indian Hemp)' it is in my view sufficient for the purpose of proving that the drug was a dangerous drug under the Act that he determined the drug was from the genus cannabis. He need not have to determine the species of the cannabis as it is clear under s 2, cannabis could be 'by whatever name it may be designated'.

E I must therefore rule that there is no merit in counsel's submission on this point.

Point two

F The informer could not claim protection under s 40(1) of the Act as he was in fact an agent provocateur. The prosecution's failure to call him as a witness attracts the presumption of adverse inference under s 114(g) of the Evidence Act 1950.

The term 'informer' is not defined anywhere in the Act. In ordinary parlance the word is used simply to describe a person who gives information. G A police informer is therefore a person who provides information to the police with regard to the commission of a crime. But if a person does more than merely providing information to the police by going a step further by introducing the offender to the police with a view to induce its commission it would be inappropriate and a contradiction in terms to call him an H informer. However, in *Munusamy v PP* [1987] 1 MLJ 492, the Supreme Court (Mohamed Azmi SCJ) held that a police informer was not an agent provocateur merely because he had accompanied a police agent and introduced him to a drug trafficker. But in another Supreme Court case, *Namasiyiam & Ors v PP* [1987] 2 MLJ 336, it was held that a person who not only introduced the accused but was present on more than one I occasion including at the time of the accused's arrest in the subsequent delivery of the drug, was a *particeps criminis* and not an informer whose failure to appear in court may well attract the provision of s 114(g) of the Evidence Act 1950. It would appear therefore the dividing line between a

mere informer and a *particeps criminis* is the degree of the person's participation in the controlled sale and delivery of the drug.

In the present case the informer had to be present twice with DSM Saidin before the first accused agreed to supply the cannabis to DSM Saidin (see summary of events, supra). It must be noted that at the first meeting at the McDonald's restaurant on 22 October 1992, the informer had already succeeded in introducing DSM Saidin to the first accused to the extent that the first accused was uninhibited enough to show five sample packets of cannabis to DSM Saidin who in turn was prompted to haggle on the price with him. It would therefore appear unbecoming of his conduct as a mere informer to appear again at the subsequent meeting the next day at Kentucky Fried Chicken with DSM Saidin. One could not objectively discount the strong probability that the sale of the drug would not have been brought about without the informer having been involved in the negotiation, although DSM Saidin denied that he was ever involved. This is all the more so if one takes into consideration the informer had to make three appointments before they could meet the first accused. I would therefore have to find that the informer was a *particeps criminis*. He was also clearly an agent provocateur which is defined in Archbold, *Criminal Pleading Evidence and Practice* (41st Ed) at 15–74 as 'a person who entices another to commit an express breach of the law which he would not otherwise have committed and then proceeds to inform against him in respect of such an offence'.

It follows therefore he could not be accorded the protection of an informer under s 40(1) of the Act or under the normal privilege accorded to such a person under the law. In the event, an adverse inference under s 114(g) of the Evidence Act 1950 ought to be drawn against the prosecution for its failure to call the informer as a witness. The failure in my view renders the whole of the prosecution's evidence which implicates the accused with trafficking in the drug highly suspicious and questionable and therefore falling short of proof beyond reasonable doubt at the close of the case for the prosecution (on the maximal evaluation as prescribed in *Khoo Hi Chiang* [1994] 1 MLJ 265) that the accused were trafficking in the drug.

I must categorically state here that in arriving at this finding I am aware that the testimonies of DSM Saidin, Insp Zorki and DPC Shakri with regard to the sale and delivery of the drug were impeccable and corroborative with minimal variance. But one must bear in mind that the accused were induced into committing the alleged offence in a staged operation by the informer and three agent provocatuers. They had planned meticulously in advance in at least two disclosed briefings and acted collectively in pursuance of a common interest as a 'committee' so to speak, to pretend to buy the drug and arrest the accused. It would be grossly imprudent therefore to give credence to their testimonies without the benefit of the informer's evidence who was, for the reason adverted to earlier, a *particeps criminis* and therefore very much a part of that committee.

However, I see no reason why I should not accept the evidence of the agent provocatuers with regard to the possession of the drug by the first

and second accused. The event was independent of the participation of the informer who had by then dropped out of the scene. It merely involves evidence of the physical act of custody or control of the bag in the hands of both the accused as seen through the eyes of the agents which was corroborated by the recovery of the bag itself. The act of being in custody or control of the bag, unlike the act of trafficking, is strictly personal to the accused which could not in any way be affected by any design of the informer. I would therefore have to accept the evidence of DSM Saidin, Insp Zorki and DPC Shakri that the second accused had the bag strapped to his back while a pillion on the motor cycle ridden by the first accused at Lucky Tuck Boh Restaurant and that the bag was taken from him by the first accused from his back at the lane beside the Al Amigo Nightclub just before it was brought into the car. It is clear therefore from their respective handling of the bag the accused were in joint custody or control of the bag, which in turn raises the presumption of possession and knowledge of the nature of the drug contained therein under s 37(d). Inevitably, possession in this instance activates the presumption of trafficking under s 37(da)(vi) of the Act by reason of the weight of the cannabis exceeding 200g. But the presumption is rebuttable and can be rebutted from the prosecution's own evidence (see *Chee Chiew Heong v PP* [1981] 2 MLJ 287 and *Soo Seng Huat v PP* [1968] 1 MLJ 80). The presumption has been rebutted in my view by the superior probability which could be legitimately drawn from the adverse inference of the failure to call the informer, that the accused could have been a victim of a frame up. How else could one explain the over-zealous acts of the informer in his attempts he made to introduce DSM Saidin to the first accused and his subsequent presence twice thereafter?

In the event, I am constrained to find that the prosecution has failed to prove beyond reasonable doubt the charge of trafficking against the accused but has succeeded merely in proving a case of possession under s 39A(2) of the Act, and hence the amendment.

There is hardly any mitigating factor in this case. The fact that the accused are first offenders, that they were both young at the time they committed the offence, and that they were neglected during their childhood years after their respective mothers' deaths, are not factors which I should take into consideration for the purpose of assessing sentence. The primary consideration here is public interest which requires a deterrent sentence to be passed. Considering the amount of cannabis recovered (644g) against the prevailing quantum imposed by courts generally in cases of similar nature, a sentence of 12 years' imprisonment with 12 strokes to run with effect from the day of their arrest on each accused should be adequate.

Accused convicted.

Reported by Kevin Ooi